Testimony of Joe Solmonese, President,
Human Rights Campaign
On the Nomination of John G. Roberts, Jr. as Chief Justice of the Supreme Court of the United States

Before the United States Senate Judiciary Committee

September 16, 2005

Members of the Committee:

I appreciate this opportunity to represent the Human Rights Campaign before this Committee. The Human Rights Campaign is a bipartisan organization that works to advance equality based on sexual orientation and gender identity and expression, to ensure that gay, lesbian, bisexual and transgender ("GLBT") Americans can be open, honest and safe at home, at work and in the community.

As a community that is particularly vulnerable to discrimination and bias-motivated violence, and that has recently been the target of discriminatory legislation, GLBT Americans are profoundly concerned about nominations to the Supreme Court of the United States. The Court is, and has been, a protector of unpopular minorities from sometimes misguided majorities. Thanks to our independent judiciary, this country abandoned its shameful system of "separate but equal," enabled individuals to regain control over reproductive decisions, and, most recently, affirmed that GLBT people cannot be branded criminals because of who we are.[1]

On August 25, 2005, the Human Rights Campaign announced its opposition to the nomination of John G. Roberts, Jr. as Associate Justice, for the reasons set forth in this testimony. Subsequently, Roberts was nominated as Chief Justice. In light of the expansive powers that the Chief Justice holds, including the power to determine who writes opinions, this nomination is more troubling still.

Starting September 12, this Committee held hearings during which Committee members questioned Judge Roberts regarding his record. Judge Roberts' responses, while articulate and deft, did not satisfy the heavy burden of proving, against the weight of his record, that as a Supreme Court justice he would uphold our civil rights and liberties.

I. The Due Process Rights of Privacy and Liberty

In *Lawrence v. Texas*, the Court concluded that sodomy laws—which until 2003 served as justification for many forms of discrimination against GLBT people[2]—violate the Due

[1] *See Lawrence v. Texas*, 539 U.S. 558 (2003).
[2] *See id.* at 560.

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Process right to liberty.[3] That case cites the Due Process privacy cases—notably *Roe v. Wade*[4] and *Griswold v. Connecticut*.[5] The legal relationship between the right to privacy described in *Griswold v. Connecticut* and *Roe v. Wade* and the right to liberty that the Court recognized in *Lawrence v. Texas* is clear. It is therefore critical to the GLBT community that a justice recognize the well-settled principle that there is a line in our lives beyond which government may not encroach—a line known as the Due Process right to privacy and liberty.

Judge Roberts' record contains strong indications that he does not recognize a constitutional right to privacy. He has written that while privacy is something most of us feel entitled to have, it is not a "right" in the constitutional sense:

> "Courts cannot, under the guise of constitutional review, re-strike balances struck by the legislature or substitute their own policy choices for those of elected officials. Two devices which invite courts to do just that are "fundamental rights" and "suspect class" review. It is of course difficult to criticize "fundamental rights" in the abstract. All of us, for example, may heartily endorse a "right to privacy." That does not, however, mean that courts should discern such an abstraction in the Constitution."[6]

As a government attorney, Roberts also co-authored a brief arguing that *Roe v. Wade* was "wrongly decided and should be overruled." He said that the Court's conclusion that there is a right to abortion "finds no support in the text, structure, or history of the Constitution."[7]

In yet another writing, Roberts denigrated the "so-called right to privacy."[8]

We are aware that Roberts indicated, in his appeals-court confirmation hearings, that he understood that *Roe v. Wade* is well-settled precedent. This does not indicate that Roberts would uphold *Roe* (or *Lawrence*) if elevated to the Court. Although court of appeals judges are bound to follow the Supreme Court's precedent, justices of the Supreme Court may re-visit cases that they believe are wrongly decided. *Lawrence v. Texas* in fact re-visited—and reversed—a Supreme Court case decided 17 years earlier.[9]

In the course of his confirmation hearings, Judge Roberts acknowledged that the Court has protected a Due Process right to privacy, but he did not claim to agree with this protection, nor did he commit to uphold the Court's privacy precedents, stating instead that he would apply the Court's settled analysis regarding *stare decisis*, but not indicating

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[3] *See id.* at 578.
[4] 410 U.S. 113 (1973).
[5] 381 U.S. 479 (1965).
[6] "Draft Article on Judicial Restraint" at 5, from Holdings of the National Archives and Records Admin. Record Group 60. Accession #60-89-372. Box 30 of 190 Folder: John G. Roberts Misc.
[7] Brief for Respondent at 13, *Rust v. Sullivan*, 500 U.S. 173 (1990) (WL 505725).
[8] Memorandum from John G. Roberts to Attorney General dated December 11, 1981.
[9] *See Bowers v. Hardwick*, 478 U.S. 1039 (1986).

whether cases such as *Roe* or *Lawrence* would survive his application of this doctrine.[10] As Senator Schumer pointed out, Judge Roberts' response to questions regarding privacy was substantially identical to then-Judge Clarence Thomas' response in his own hearing. Senator Schumer correctly noted that since being confirmed, Justice Thomas has consistently denied the existence of a Due Process right to privacy.[11] He further noted that Justice Thomas expressed this view when dissenting in the *Lawrence* decision.[12] Judge Roberts stated that he was "not willing to state a particular view on the *Lawrence* decision," including Justice Thomas' dissent.[13]

The combination of his record and his responses in the hearing point to a very limited or non-existent view of the Due Process right to privacy, and no commitment to upholding the liberty that the Court recognized in *Lawrence.*

II. Stripping Courts of Jurisdiction to Hear Constitutional Claims

Our concern that Judge Roberts would not vigorously enforce constitutional protections is reinforced by his writings on so-called "court stripping" statutes. When Roberts was serving in the Reagan Justice Department, he authored a memorandum setting forth arguments in favor of legislation to strip courts of jurisdiction to hear certain classes of constitutional claims. Although the memorandum makes clear that it is an advocacy piece drafted at the behest of his superiors, a later writing indicates that Roberts apparently agrees that such legislation is constitutional. In commenting on an analysis in which then Assistant Attorney General Theodore Olson wrote that opposing the bills on constitutional grounds would appear principled and courageous, Roberts wrote that "real courage would be to read the Constitution as it should be read and not kowtow to the Tribes, Lewises, and Brinks!"[14] It appears from this writing that Roberts believed that the Constitution *should be read* to permit Congress to sharply limit the Court's constitutional function, thereby narrowing litigants' avenues for relief from unconstitutional legislation. We disagree with this conclusion as a matter of constitutional law.

Roberts' apparent belief that "court stripping" legislation is constitutional is particularly relevant at this time and to the GLBT community. This legislation, which failed to be enacted when Roberts last considered it, is once again darkening the halls of Congress. Two court-stripping bills passed the House of Representatives in 2004.[15] One of those bills, the so-called Marriage Protection Act, stripped the courts of jurisdiction to consider

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[10] *See* transcript of proceedings, September 13, 2005, questioning by Senator Specter.
[11] *See* transcript of proceedings, September 14, 2005, questioning by Senator Schumer.
[12] *See id.*
[13] *See id.*
[14] *See* Theodore Olson, "Policy Implications of Legislation Withdrawing Supreme Court Appellate Jurisdiction over Classes of Constitutional Cases." April 12, 1982. With handwritten comments by John G. Roberts. Roberts apparently refers to Harvard Law Professor Lawrence Tribe, New York Times columnist Anthony Lewis, and then-ABA President David Brinks, who opposed such bills.
[15] "Marriage Protection Act," H.R. 3313, passed 233-194 on July 22 2004 (stripping jurisdiction over challenges to the "Defense of Marriage Act"); Pledge Protection Act, H.R. 2028, passed 247-173 September 23, 2004 (stripping jurisdiction over cases involving the Pledge of Allegiance).

challenges to the "Defense of Marriage Act," a discriminatory law that uniquely affects GLBT people and our families.

Should a bill like the Marriage Protection Act be passed into law, Judge Roberts' record raises concerns that he would uphold it.

Jurisdiction-stripping bills fundamentally alter the system of checks and balances, rendering constitutional protections functionally meaningless. If such statutes are constitutional, then there is no limit to Congress' power, and no redress for American citizens who are the objects of discriminatory legislation.

Senator Kohl questioned Judge Roberts regarding his writings on bills that strip the courts of jurisdiction over constitutional claims.[16] Although Judge Roberts stated that such bills are "bad policy," he did not refute his earlier claim that they are constitutional, stating instead "I don't think I should express a determinative view because, as you know, these proposals do come up and one may be enacted."[17] The hearings, and Justice Roberts' writings, are peppered with clear statements about the distinction between policy questions — which are the province of the legislatures—and constitutional questions—which are province of the Court. This is, indeed, the essence of his claim to embrace "judicial restraint" and "modesty." Therefore, the best evidence of his philosophy regarding court stripping is his work in the Justice Department, advancing an argument that the Administration ultimately rejected.

III. Congress' Authority to Enact Protective Legislation

Because the GLBT community is particularly vulnerable to hate violence and to employment discrimination, Congress' power to legislate to prevent these social ills is of vital importance to GLBT Americans. The GLBT community is also disproportionately affected by HIV and AIDS, disabilities protected under the Americans with Disabilities Act. Therefore, judicial decisions that limit the scope of that Act[18] are particularly detrimental to the GLBT community.

In *Rancho Viejo v. Norton*,[19] Roberts wrote a dissent from a denial of rehearing in which he argued that Congress' power to enact environmental protection legislation was quite limited. Although the Rehnquist Court has in fact curtailed Congress' Commerce Clause power in recent years, Roberts' *Rancho Viejo* reasoning goes far beyond current Supreme Court precedent. Not only did the DC Circuit reject this reasoning, but the Supreme Court later rejected it in another context.[20]

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[16] *See* transcript of proceedings, September 13, 2005, questioning by Senator Kohl.
[17] *See id.*
[18] *See Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001)(holding that in enacting the ADA, Congress had not abrogated states' Eleventh Amendment sovereign immunity by showing a pattern of unconstitutional state discrimination against disabled).
[19] 334 F.3d 1158 (D.C. Cir. 2003)(Roberts, J., dissenting from denial of rehearing *en banc*).
[20] *See Gonzales v. Raich*, 2005 U.S. Lexis 4656 (June 6 2005) (holding that application of federal drug laws to people who grew marijuana for their own medical use was a valid exercise of Commerce power,

Judge Roberts declined to answer Senator Feingold's question regarding Congress' authority to prohibit discrimination against gay and lesbian Americans in employment, stating "I don't know if that's an issue that's going to come before the courts. I don't know if Congress has taken that step yet. And until it does, I think that's an issue that I have to maintain some silence on."[21] Roberts failed, in the hearing, to demonstrate respect for Congress' authority to remedy discrimination.

IV. Equal Protection

We are aware that Judge Roberts, as a partner at the DC law firm of Hogan & Hartson, provided limited assistance to the attorneys prosecuting the landmark GLBT rights case *Romer v. Evans*, a case on which his law firm served as co-counsel.[22] While his participation in that case is notable, we are concerned that Judge Roberts' view of the Equal Protection Clause—the constitutional provision upon which the Court relied in striking down a discriminatory state amendment—is narrow, and out of the mainstream.

Under current law, laws that create separate classifications for GLBT people are subject only to "rational basis" review, meaning that they must be rationally related to a legitimate state interest. Scholars who follow GLBT-rights law have seen encouraging signs, in the form of *Romer* and *Lawrence*, that courts are on their way to applying a more rigorous standard, so-called "rational basis with teeth."

Judge Roberts been critical of applications of the Equal Protection Clause to classifications other than race.[23] In his article on judicial restraint, Roberts criticized the Court for applying "suspect class" analysis to other classifications. Although currently GLBT people are not accorded "suspect class" status,[24] Roberts' narrow view of the Equal Protection Clause bodes poorly for litigants seeking the protections of that provision.

Furthermore, even if Roberts' views of suspect class status were not relevant, it appears that his judicial philosophy would lead him to apply the "rational basis" test less rigorously than the *Romer* Court did. His writings criticizing what he calls unwarranted intrusions into the legislative arena[25] illustrate that he might defer to legislatures even when discriminatory animus underlies a statute if the affected group is not a "suspect class."[26]

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because even though the activity was purely *intra*state, the regulation valid as part of a scheme of regulating interstate activities).

[21] *See* transcript of proceedings, September 14, 2005, questioning by Senator Feingold.

[22] 517 U.S. 620 (1996).

[23] *See* Draft Article on Judicial Restraint, *supra* note 5.

[24] *See Romer*, 517 U.S. at 635.

[25] *See* Draft Article on Judicial Restraint, *supra* note 5.

[26] [26] *See also Hedgepath v. WMATA*, 2004 WL 595070 (D.C. Cir. 2004), in which Roberts upheld, under rational basis review, a DC policy of arresting and detaining minors for offenses that would result only in a citation for adult offenders.

In the hearings, Roberts claimed that his writings as a Reagan Administration attorney reflected the views of his superiors, but did not illuminate his own views on enforcement of the Equal Protection Clause.

V. Withholding of documents regarding Roberts' role as political Deputy Solicitor General

As set forth above, the information about Roberts' record and philosophy that has been made available paints a picture of a justice who would limit, rather than protect, civil rights. The Administration's decision to withhold documents relating to Roberts' service as political Deputy Solicitor General under President George H.W. Bush creates further concerns about the nominee. While the American people know that Roberts participated—and was, in fact, a decision-maker—in important civil rights cases in that job, no documents have been released that would enable the people nor this distinguished Committee to assess Roberts' legal opinions regarding these cases. In light of the troubling record that has come to light, the need for these important documents is all the more urgent and we remain extremely disappointed that these documents have never come to light, in order to do the rigorous review necessary for an individual nominated to have a lifetime appointment as the leader of the federal judiciary.

CONCLUSION

As set forth in the legal analysis sections above, the evidence released thus far overwhelmingly indicates that Judge Roberts would vote with the Court's right wing, and that he would not carry out his responsibility to uphold constitutional rights. In the course of this Committee's hearing, Judge Roberts had an opportunity to rebut the overwhelming evidence in his record, but declined to do so. For all of the reasons set forth above, the Human Rights Campaign urges this Committee to reject the nomination of John G. Roberts, Jr. to the Supreme Court of the United States.